MAR 12 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 944-945

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a Bankrupt, *Petitioner*,

v.

JENNY R. MATHEWS, Executrix of the Estate of George B. Mathews, Deceased, *Respondent*.

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a Bankrupt, *Petitioner*,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendant and Third Party Plaintiff, *Respondents*,

v.

JENNY R. MATHEWS, Executrix of the Estate of George B. Mathews, Deceased, Third Party Defendant, *Respondent*.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a bankrupt, *Petitioner*.

By: JOHN CORCORAN,
717 Oliver Building,
Pittsburgh 22, Pa.

AUGUST G. GUTHEIM,
1425 H St., N. W.,
Washington 5, D. C.
Counsel for Petitioner.

March 12, 1946.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1
A. Summary Statement of the Matter Involved	2
B. The Jurisdiction of this Court	8
C. The Questions Presented	9
D. Reasons Relied Upon for the Granting of the Writ	9
Brief in Support of Petition for Writ of Certiorari	1
The Contract entered into by Mathews (deceased) and Lum under date of February 2, 1934, constituted a pledge	2
The Payments required by the contract, to keep option to repossess alive, were made by Lum in strict accordance with the contract as respects both amount and time	3

Index to Cases Cited in Brief.

Home Bond Company v. McChesney, 239 U. S. 568	3
General Motors Acceptance Corp. v. Mid-West Chevrolet Co., 66 F. (2d) 1	3
Ketter v. American Bankers Finance Co., 306 Pa. 483	3
Mount Tivy Winery v. Lewis, 134 F. (2d) 120	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 944, 945

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a Bankrupt, *Petitioner*,

v.

JENNY R. MATHEWS, Executrix of the Estate of George B. Mathews, Deceased, *Respondent*.

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a Bankrupt, *Petitioner*,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendant and Third Party Plaintiff, *Respondents*,

v.

JENNY R. MATHEWS, Executrix of the Estate of George B. Mathews, Deceased, Third Party Defendant, *Respondent*.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

Merritt I. Edner, as Trustee in Bankruptcy, respectfully presents this petition, and prays that this Honorable Court grant a Writ of Certiorari and review the decision of these cases by the United States Circuit Court of Appeals for the Third Circuit, which said decision was delivered on October 16, 1945 (petition for reconsideration having been

denied on December 13, 1945) and affirmed the judgments of the United States District Court for the Western District of Pennsylvania, in favor of respondents; and in support of said petition, Merritt I. Edner represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

(The references (Pr. Tr.) are to the pages of the printed record from the District Court as filed in the Circuit Court of Appeals.)

Edner, the petitioner, is the Trustee in Bankruptcy of one George H. Lum; Mathews, the respondent, is Executrix of the Estate of George B. Mathews, deceased. Both Edner and Lum are residents of DuBois, in the Commonwealth of Pennsylvania; respondent Mathews is, and Mathews (deceased) was a resident of Buffalo, in the State of New York.

Edner, as such Trustee, filed two suits in the United States District Court for the Western District of Pennsylvania, the first on January 3, 1942 against George B. Mathews, the second on August 4, 1942 against the Massachusetts Mutual Life Insurance Company (Pr. Tr. 559a, 565a), in an endeavor to recover certain assets of Lum, the bankrupt. (Pr. Tr. 1a, 16a). By amendment to the second suit on February 24, 1944, Edner sought also an accounting between himself and Mathews of "all matters • • • which grow out of or are related to, the contract or arrangement of February 2, 1934" between Lum and Mathews (deceased), "and all other matters between the two necessary to such determination." (Pr. Tr. 21a-22a)

The entire controversy grows out of the said contract of February 2, 1934 between Lum and George B. Mathews (Pr. Tr. 9a). Since its date Lum has been declared a bankrupt, on October 31, 1940, and Edner, the petitioner, has been appointed his trustee; George B. Mathews died on February 3, 1942, and Jenny R. Mathews, the respondent, is the executrix of his estate. (Pr. Tr. 1a, 16a, 79a, 528a-529a)

Lum, in 1933, was in financial difficulties, and in danger of losing collateral which he had pledged to certain of his creditors. He appealed to Mathews (deceased) for financial help. Lum and Mathews (deceased) had then for many years been good friends and quite closely associated. (Pr. Tr. 49a, 78a).

According to the recital of the District Judge in his opinion (Pr. Tr. 544a-545a):

> "As a result of their negotiations, Mathews and Lum entered into a contract dated February 2, 1934 (Exhibit A attached to the complaint herein), wherein it was agreed that Lum would sell, and Mathews would buy, certain assets and property of him for $71,801.21. Among these properties were farms in the Town of Somerset, New York, three policies of insurance in the Massachusetts Mutual Life Insurance Company on the life of Lum, certain stocks in oil and gas companies in Pennsylvania (which by reason of merger resulted in one thousand shares of stock of the Mill Creek Gas and Oil Company being issued to said Mathews). As a result of this agreement, Lum's indebtedness to Mathews of $37,964.62 was cancelled; and Mathews advanced $71,801.21, to pay Lum's debts, making a total of $109,765.83.
>
> By this agreement Lum had a right to re-purchase the assets conveyed to Mathews for $109,765.83, plus four percent interest, when Mathews would return to Lum the notes Lum had given him, and any unsold collateral. This re-purchase option was to be kept alive by payments of $2800 a year in monthly installments; and if any required payment was one hundred and twenty days in arrear, the option was to be cancelled. Pursuant to this contract, Mathews paid off $71,801.21 of Lum's debts and secured the release of such debts and any collateral held by these creditors. Mathews then took over said collateral and Lum also delivered to Mathews deeds for the New York real estate."

Some further analysis of the contract between Lum and Mathews (deceased) is advisable.

As respects the option payments of $2800.00 per annum, it required only that they should be made "in equal

monthly installments" (Pr. Tr. 11a); it did not require such payments on any specific day, either on the contract monthly anniversary or any other day; payment during the month, and that only, seems to have been the obligation on Lum. Also, all income from the pledged assets were to be credited to Lum, as payments on his option.

Again, although the contract provided that Mathews (deceased) could at any time sell the pledged assets, any such sales were made subject, upon ten days notice to Lum as respected the personal property, and ninety days as respected the real estate, of the price and terms of any such proposed sale, to a "first right to purchase said property at that price and under those terms," reserved to Lum. (Pr. Tr. 12a)

Then followed the two contract provisions next quoted,—Mathews (deceased) being the party of the first part and Lum being the party of the second part therein referred to. (Pr. Tr. 12a-13a):

> "VII. It is the understanding of the parties that the party of the first part is entitled to recover from the items in this option and or the collateral attached to the notes now held by the party of the first part the entire indebtedness between the parties as it existed on the date of this contract and the purchase price of the assets hereby purchased, together with interest at 4% in dollars or such other units as may take the place of dollars, the total amount of which shall have approximately the same purchasing power at the time of recovery as $109,765.83 has on the date of this contract.
>
> VIII. When the party of the first part shall have received from the assets hereby purchased and or the collateral attached to the notes now held by the party of the first part a total of $109,765.83 or such other amount as shall represent the purchasing power thereof as elsewhere herein provided and 4% interest thereon, the notes and open account of the party of the second part to the party of the first part, hereinbefore listed shall be considered paid and the notes with unsold collateral attached will then be returned to the party of the second part."

The District Judge concluded that the contract of February 2, 1934, was "a valid contract of sale." (Pr. Tr. 552a) Petitioner contends and has always contended that it was a pledge. But however it may be characterized, Lum's rights, and therefore petitioner's rights, thereunder, depend in the very first instance upon whether or not Lum's credits and payments both as to amount and time were such as to keep alive his option (Pr. Tr. 11a-12a, 545a) to repurchase the pledged assets. The record, with respect to this specific issue, is as follows:

1. The contract of February 2, 1934, was prepared by Mr. Edward N. Mills, of the law firm of Albrecht, Maguire & Mills, of Buffalo, N. Y., as counsel for George B. Mathews. (Pr. Tr. 34a)

2. George B. Mathews at that time was a man well up in years and of rather infirm health. (Pr. Tr. 34a)

3. Joseph A. Albrecht, also a member of the law firm of Albrecht, Maguire & Mills, was attorney and agent of George B. Mathews, and "has personal knowledge of all the transactions with the bankrupt (i. e., Lum), and had direct charge of all negotiations with the bankrupt as agent for said George B. Mathews." (Pr. Tr. 492a)

4. Mills, testifying with respect to a "Statement of account of George B. Mathews against George H. Lum to January 1, 1939", as kept by Albrecht, Maguire and Mills, the attorneys and agents of Mathews (deceased) in all these transactions, stated that,

"The figures appear to be accurate",

and that, "His (i. e., Lum's) option, was paid up to that time." (Pr. Tr. 41a, 43a)

5. Mills testified further that Lum became in default with respect to the required option payments "in 1939, * * * within 120 days after the first of January according to the contract, he was in default." (Pr. Tr. 43a)

6. On January 12, 1939, default was declared in a letter from Albrecht, Maguire & Mills, J. A. Albrecht, to Lum. (Pr. Tr. 43a-44a, 92a).

7. "The loose-leaf original ledger sheets of the account of Mr. Mathews with Mr. Lum," as kept by Albrecht, Maquire & Mills, to December 31, 1939, are of record as Exhibits 8, 8a, 8b, and 8c. Pr. Tr. 39a-40a, 107a, 109a, 111a, 113a).

8. Witness Sproul, who audited the said account, testified that as of June 12, 1939, Lum had made payments or received credits in the option account as follows:

Year 1934,	$2,720.07
" 1935,	2,946.67
" 1936,	3,113.87
" 1937,	5,409.10
" 1938,	2,939.50
" 1939 (there being no further payments after Lum's default was declared),	116.77,
Total,	$17,245.92;

that at the monthly rate of $233.33 the total option payments or credits required by the contract for the period February 2, 1934 to June 12, 1939, was $15,026.45; and that "the credits, therefore, exceed the charges in the amount of $2,219.47," for the period ending June 12, 1939. (Pr. Tr. 500a-503a)

Such was the evidence before the District Court, addressed to the fundamental issue,—"Had Lum defaulted on the required option payments and thus forfeited his option rights to repossess the pledged collateral?"

The District Judge in his opinion recites the salient features of the contract of February 2, 1934, and performance thereunder by Mathews (deceased). (Pr. Tr. 544a-545a) Then immediately follow the statements that:

"Lum made option payments of $2,219.47, but became in default thereon. On January 12, 1939, Mathews informed Lum of default in the option. Since that time no further payments have been made on the option." (Pr. Tr. 545a)

Clearly, at this point the District Judge was laboring under a misapprehension. He was deciding the basic issue while of the erroneous impression that Lum's credit balance as of June 12, 1939, i. e., $2,219.47, was really the aggregate of Lum's option payments, whereas the evidence showed that Lum's option payments were $17,245.92. Being under that erroneous impression, the District Judge promptly, but again erroneously, concluded that "On these facts we are of the opinion that plaintiff is not entitled to relief in either action." (Pr. Tr. 545a-546a)

However, proceeding next to his Findings of Fact, the District Judge therein showed a correct understanding of the arithmetic of the option account. In finding 12 he stated:

"Lum made option payments and on June 12, 1939, had a credit balance of $2,219.47. On January 12, 1939, Mathews informed Lum of default on the option. Since that time no payments were made." (Pr. Tr. 552a)

Nevertheless and notwithstanding the foregoing correct finding of fact, made in strict accord with the uncontroverted evidence on the subject, the District Judge then made this Conclusion of Law:

"V. Lum's option rights under the contract were forfeited by a failure to maintain the monthly payments; and his trustee in bankruptcy is not entitled to recover the one thousand shares of Mill Creek Gas and Oil Company stock, as prayed for in C. A. 1769." (Pr. Tr. 553a)

The District Court denied the plaintiff's claim for relief in both actions. (Pr. Tr. 548a) The consequence is that the

Mathews Estate, Lum's principal creditor (Pr. 528a), has possession of all of Lum's assets. Lum's trustee in bankruptcy testified herein that he has not been able to get hold of any assets. (Pr. Tr. 529a)

On Appeal, the matter was submitted upon oral argument before Judges Albert Lee Stephens, Goodrich and McLaughlin of the Court of Appeals for the Third Circuit on October 9, 1945. The opinion of the Court was filed on October 16, 1945, being, verbatim, as follows: (Tr. 583-584)

> "Per Curiam
>
> These two cases come to the Court from judgments of the District Court for the Western District of Pennsylvania. They involve several questions, all of which we think are questions of fact. Upon these questions there was conflicting testimony and each side points to facts tending to support the conclusion it urges. We quite realize that the questions are arguable. But the District Judge, having all the testimony before him, resolved it in well defined conclusions. We think that all of his conclusions are supported by such evidence and that we could not say, if we would, that they are clearly erroneous.
>
> The judgments are, therefore, affirmed."

On December 13, 1945, the Circuit Court, by Judge Goodrich, entered its order denying the petition for rehearing, with Judge Biggs dissenting. (Tr. 589)

Thereafter, on February 26, 1946, petitioner filed in the Circuit Court of Appeals his Motion to Recall the Mandates and for Leave to File a further Petition for Rehearing. After oral argument before Judges Biggs, Maris and O'Connell on March 4, 1946, the said Motion was denied. (Tr. 5[illegible] 591)

B. THE JURISDICTION OF THIS COURT.

Jurisdiction of this Court to issue the Writ of Certiorari sought is found in U. S. C. A., Title 28, Sec. 347(a).

The final decree of the Circuit Court of Appeals for the Third Circuit was filed December 13, 1945.

C. THE QUESTIONS PRESENTED.

There are two questions presented for determination by this Court.

1. The construction of the contract between Mathews (deceased) and Lum, the bankrupt, entered into on February 2, 1934, and whether it was "a valid contract of sale," as found by the District Court, or was a pledge, as contended by this petitioner.

2. Whether or not Lum, the bankrupt, forfeited his right to repossess the pledged assets by failure to make the payments required to keep his option right alive.

D. REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

Petitioner respectfully submits, for the reasons enumerated below, that this petition is filed out of a firm conviction that this is a proceeding in which, to quote the language of this Court's Rule 38, sub-division 5(b), the Circuit Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court of Western Pennsylvania, as to call for an exercise of this Court's power of supervision.

1. The citizenship of the parties is diverse.

2. The property involved in each of the two suits, and that which would be involved in any final accounting between the parties greatly exceeds the sum of $3,000.00.

3. The District Judge rendered his opinion denying relief in both cases upon the basis of an erroneous construction of the contract between the parties; and further upon an erroneous understanding of the evidence pertaining to the option payments, which evidence was wholly uncontroverted.

4. The District Judge made a correct Finding of Fact respecting the option payments in strict accord with the

wholly uncontroverted evidence on that subject, but also made an incorrect Conclusion of Law with respect thereto, which was a complete *non-sequitur*.

5. The Circuit Court of Appeals failed to recognize that a basic question here involved was a question of law, i.e., the construction of the contract of February 2, 1934, between Mathews (deceased) and Lum, and never addressed itself to that question.

6. The decision of the Circuit Court of Appeals is predicated upon three conclusions: (a) the cases "involve several questions, all of which we think are questions of fact;" (b) the testimony was conflicting but the District Judge "resolved it in well defined conclusions;" and (c) "his conclusions are supported by such evidence;" whereas, the record demonstrates that said conclusions of the Circuit Court of Appeals are erroneous in that, (a) the fundamental questions embraced both questions of law and questions of fact; (b) the District Judge did not resolve the testimony in well defined conclusions, but on the contrary made findings of fact which were at variance with each other and with his findings on the same point in his opinion; and (c) certain essential conclusions of the District Judge are not only not supported by the evidence but in fact are in direct conflict with the uncontradicted evidence of record, and his correct finding of fact respecting the option payments, as already shown.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals of the United States for the Third Circuit and commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and titled on its docket as No. 8886, Merritt I. Edner, Trustee in Bankruptcy of George H. Lum, a Bankrupt, Plaintiff, Appellant,

v. Jenny R. Mathews, Executrix of the Estate of George B. Mathews, Deceased, Defendant, and No. 8887, Merritt I. Edner, Trustee in Bankruptcy of George H. Lum, a Bankrupt, Plaintiff Appellant, v. Massachusetts Mutual Life Insurance Company, a Corporation, Defendant and Third Party Plaintiff, v. Jenny R. Mathews, Executrix of the Estate of George B. Mathews, deceased, Third Party Defendant; and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court; and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a bankrupt, *Petitioner.*

By: JOHN CORCORAN,
717 Oliver Building,
Pittsburgh 22, Pa.

AUGUST G. GUTHEIM,
1425 H St., N. W.,
Washington 5, D. C.
Counsel for Petitioner.

March 12, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 944, 945

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a Bankrupt, *Petitioner,*

v.

JENNY R. MATHEWS, Executrix of the Estate of George B. Mathews, Deceased, *Respondent.*

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a Bankrupt, *Petitioner,*

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendant and Third Party Plaintiff, *Respondents,*

v.

JENNY R. MATHEWS, Executrix of the Estate of George B. Mathews, Deceased, Third Party Defendant, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The opinion of the Circuit Court of Appeals is not officially reported, but is set forth verbatim in the Summary Statement of the Matter Involved in the foregoing petition. (Tr. 583-

The Jurisdiction of this Court, as already stated, is found in USCA Title 28, Section 347 (a).

THE CONTRACT ENTERED INTO BY MATHEWS (DECEASED) AND LUM UNDER DATE OF FEBRUARY 2, 1934, CONSTITUTED A PLEDGE.

Probably in the view which the District Judge took of the controversy and because of the manner in which he disposed of the issues, there was no great materiality attaching to his characterization of the contract. For the same reason, perhaps, the Circuit Court of Appeals never addressed itself to this particular question. However, anticipating the time when the dealings between the parties may become the subject of an accounting, correct characterization of the contract becomes of some importance.

This contract was prepared by the attorneys for Mathews (deceased), who conducted the negotiations on his behalf with Lum. Lum was not represented by counsel, or, as Lum put it, "not unless it was Albrecht, Maguire and Mills." (Pr. Tr. 534a)

The District Court construed the contract as "a valid contract of sale." (Pr. Tr. 552.) It is the contention of petitioner that it was no more than a pledge.

It is true that the contract uses the verb "buy" and the verb "sell" as descriptive of the participation therein by Mathews (deceased) and Lum, respectively. (Pr. Tr. 9a) But there is much more to the contract that that mere statement of such participation.

There was, for instance, the right in Lum to re-possess the pledged assets at any time within fifteen years, provided that the financial consideration to support the option so to do was currently paid by Lum. Although Mathews, deceased, had the right to sell the pledged assets, he could do so only after notice to Lum of any proposed sale, and subject to the right on Lum's part to substitute himself as purchaser at the price and terms agreed upon for the proposed sale. In the event that any of the assets were sold by Mathews (deceased), the proceeds of the same were to be applied to Lum's indebtedness under the contract. Finally, at any time when Mathews (deceased) received from any

disposition of the pledged assets the amount of the loan and four percent interest thereon, Lum *ipso facto* regained possession of any unsold collateral remaining.

These various provisions, we submit, definitely stamp the contract as a pledge and not as a purchase and sale, and this seems to be the law of such decisions as *Home Bond Company* v. *McChesney*, 239 U. S. 568; *General Motors Acceptance Corp* v. *Mid-West Cheverolet Co.*, 66 F. (2d) 1; *Mount Tivy Winery* v. *Lewis*, 134 F. (2d) 120; *Ketter* v. *American Bankers Finance Co.*, 306 Pa. 483. The record definitely shows that Lum had put up his assets "as collateral. No question about that." (Pr. Tr. 511a)

THE PAYMENTS REQUIRED BY THE CONTRACT, TO KEEP HIS OPTION TO REPOSSESS ALIVE, WERE MADE BY LUM IN STRICT ACCORDANCE WITH THE CONTRACT AS RESPECTS BOTH AMOUNT AND TIME.

The same attorneys and agents for Mathews (deceased) who represented him throughout the negotiations with Lum, and who prepared the contract, continued to represent Mathews (deceased) and maintained the account between Mathews (deceased) and Lum.

The evidence of Lum's payments and credits on the option account comes from that statement maintained by Albrecht, Maguire & Mills, attorneys for Mathews (deceased). The evidence that Lum was paid up on the option account to January 1, 1939 was the admission by the same member of that law firm who prepared the contract. The evidence of Lum's detailed payments, and the fact that his final credit was $2219.47 as of the day of his supposed forfeiture of his option right, came from the same account.

The declaration and notice of default was made by the same law firm, and by the particular member thereof who acted as agent for Mathews (deceased) in all of the latter's negotiations with Lum. And as an incident, it may be noted that as Lum was paid up to January 1, 1939, and a new

month began under the contract on January 2, 1939, at any time during which month Lum could have made his payment, if due, the declaration and notice of default on January 12, 1939 was premature.

None of this evidence is controverted in this record.

It is not for this petitioner to explain, and, indeed, he cannot explain how the District Judge reached his diverse Findings of Fact on this particular subject. Nor can this petitioner explain how the District Judge, after he had correctly found that Lum was actually overpaid $2219.47 on the final day of the supposed default, could then, as a Conclusion of Law, find that Lum had defaulted on his contract, and forfeited his option rights.

Nor is it for this petitioner to explain, nor can he explain, how, in the face of this state of the record, the Circuit Court of Appeals disposed of this controversy in the belief that all of the questions were questions of fact, that the facts were in controversy, but that the District Judge resolved them in well defined conclusions.

Petitioner respectfully submits that his every aim to recover assets of the bankrupt Lum, for the benefit of his creditors has been thwarted by the errors of the Courts below. Unless the action of this Court is such as will permit the Trustee to go forward in that endeavor, all creditors of Lum, other than the Mathews Estate, are foreclosed.

Petitioner therefore respectfully submits this is a case which calls for the exercise by this court of its power of supervision over the courts below sufficiently to remand the case for such action as will enable petitioner to secure an accounting.

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a bankrupt, *Petitioner.*

By: JOHN CORCORAN,
717 Oliver Building,
Pittsburgh 22, Pa.

AUGUST G. GUTHEIM,
1425 H St., N. W.,
Washington 5, D. C.
Counsel for Petitioner.

March 12, 1946.

FILED
APR 8 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945.

Nos. 944, 945.

MERRITT I. EDNER, Trustee in Bankruptcy of GEORGE H. LUM, Petitioner,
v.
JENNY R. MATHEWS, Executrix of the Estate of GEORGE B. MATHEWS, Deceased, Respondent.

MERRITT I. EDNER, Trustee in Bankruptcy of GEORGE H. LUM, Petitioner,
v.
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendant and Third Party Plaintiff, Respondents,
v.
JENNY R. MATHEWS, Executrix of the Estate of GEORGE B. MATHEWS, Deceased, Third Party Defendant, Respondent.

Brief of Jenny R. Mathews, Executrix of the Estate of George B. Mathews, Deceased, Third Party Defendant, Respondent in Each Case.

PETITION BY PLAINTIFF FOR WRITS OF CERTIORARI TO CIRCUIT COURT OF APPEALS.

EDWARD N. MILLS,
ALBRECHT, MAGUIRE & MILLS,
1300 Genesee Building,
Buffalo, New York,

P. K. MOTHERAL,
REED, SMITH, SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh 19, Pennsylvania,

Attorneys for Jenny R. Mathews, Executrix, Defendant, Respondent.

April 8, 1946.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

SUBJECT INDEX.

PAGE

I. STATEMENT OF CASE 1
- A. Action No. 1769 1
- B. Action No. 2200 2
- C. Actions No. 1769 and No. 2200 Mutually Destructive 3
- D. Valid Contract of Sale 4
- E. Plaintiff's Contract Obligations Unperformed 4
- F. Sproul's Testimony Incompetent and Misleading 5
- G. Accounts Used by Sproul Actually Show Deficit of $1721.66 7
- H. Decision of District Court upheld three times by Circuit Court 9

II. ARGUMENT
- POINT I—Petition does not recite proper or sufficient grounds for invoking jurisdiction of this court under its Rule 38, Subdivision 5 (b) 10
- POINT II—Petitioner's request for an accounting transcends jurisdiction of District Court arising out of Section 118 or Interpleader action 11
- POINT III—Question of payment or non-payment of option installments immaterial to decisions in Actions No. 1769 and No. 2200 13
- POINT IV—Petitioner, if aggrieved by 12th Finding of Fact, had adequate remedy to correct in District Court 14
- POINT V—Construction of contract of February 2, 1934 approved on three separate occasions by Circuit Court of Appeals 15

III. CONCLUSION 19

CITATIONS.

PAGE

Alabama Power Company v. Icker, 302 U. S. 464..... 10
Anderson v. Abbott, 321 U. S. 349, rehearing denied 321 U. S. 804 10
Cook v. Berrott, 21 N. Y. Supp. 358..... 17
Dodge v. McKechnie, 156 N. Y. 514..... 17
General Motors Acceptance Corp. v. Midwest Chevrolet Co., 66 F. (2nd) 1..... 18
General Talking Pictures Corp. v. Western Electric Compeny, 304 U. S. 175, rehearing denied 305 U. S. 675 10
Goodyear Tire and Rubber Company, Inc. v. Ray-O-Vac Company, 321 U. S. 275..... 10
Hine v. Bowe, 114 N. Y. 350..... 17
Home Bond Company v. McChesney, 239 U. S. 568..... 17
Kelly v. Babcock, 49 N. Y. 318..... 17
Maya Corporation v. Smith, 32 F. (2nd) 350..... 12
Mount Tivy Winery Co. v. Lewis, 134 F. (2nd) 120.... 18
Tompkins v. Hunter, 149 N. Y. 117..... 17
Virginia Street Railway Co. vs. System Federation No. 40, 300 U. S. 515 10

IN THE

Supreme Court of the United States

October Term, 1945.

Nos. 944, 945.

MERRITT I. EDNER, Trustee in Bankruptcy of GEORGE H. LUM, Petitioner,
v.
JENNY R. MATHEWS, Executrix of the Estate of GEORGE B. MATHEWS, Deceased, Respondent.

MERRITT I. EDNER, Trustee in Bankruptcy of GEORGE H. LUM, Petitioner,
v.
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendant and Third Party Plaintiff, Respondents,
v.
JENNY R. MATHEWS, Executrix of the Estate of GEORGE B. MATHEWS, Deceased, Third Party Defendant, Respondent.

I. Statement of Case.

In order to more completely and accurately summarize the pleadings and facts involved, the respondent herein outlines the following pertinent matters:

A. Action No. 1769.

Edner, as Trustee in Bankruptcy of one George H. Lum, on January 3, 1942, brought Action 1769 against George B. Mathews in the United States Court for the Western District of Pennsylvania. Mathews was a resident of New York State. Petitioner was permitted to effect service outside the Western District of Pennsylvania under

Statute 28, W. S. C. A. 118 on the plea that title to certain shares of stock in a Pennsylvania Corporation was in question.

Petitioner alleged that the contract dated February 2, 1934 transferring these shares to Mathews was contrary to the fraudulent conveyance statutes of Pennsylvania and New York. No actual fraud was alleged, the averments being that the consideration was inadequate and that the transferor was thereby rendered insolvent (Appendix 1 a to 9 a). The action was an attempt to rescind the agreement by which Lum transferred his assets, including stock, to Mathews.

B. Action No. 2200.

Subsequently on August 4, 1942, the petitioner brought a second action in the same court against the Massachusetts Mutual Life Insurance Company to secure the cash surrender value of certain life insurance policies on the life of George H. Lum (Appendix 16 a to 20 a). The policies had also been transferred to Mathews in the same contract dated February 2, 1934.

The Insurance Company deposited a bond in the sum of $42,500.00 with the District Court and interpleaded the Estate of Mathews under 28 USCA 41 (26).

The respondent interposed a counterclaim (Appendix 26 a) for absolute title to the policies as provided in the contract dated February 2, 1934 (Appendix 10 a), because George Lum in making the assignment "as collateral" had not complied with the terms of the contract.

Actions under 41 (26) are also limited in character to enable insurance companies to effect service on defendants outside the Federal District.

As in Action No. 1769 brought under 28 USCA 118, the jurisdiction of the court is and should be limited within reason to the adjudication of the single issues, title to the stock in question and the respective rights of the parties to the proceeds of the insurance.

Subsequently on February 4, 1944, the Petitioner amended the *Ad Damnum* clause in the Interpleader action, No. 2200, requesting "that all matters between this plaintiff and * * * Mathews, which grow out of or are related to, the contract or arrangement of February 2, 1934, and all other matters between the two necessary to such determination, be now fully adjudicated and determined by the Court" (Appendix 21 a).

The effect of this amendment was to bring before the court numerous extraneous issues that would not have been proper either in an action under Section 118 or under Section 41 (26) and that would have been proper only in an action brought in the United States District Court in the Western District of New York where the defendant resides (Appendix 433 a and 434 a).

C. Actions No. 1769 and No. 2200 Mutually Destructive.

Additional difficulties arose from the mutually destructive legal principles on which Actions No. 1769 and No. 2200 were predicated. In the action to obtain title to the shares of stock, petitioner contended that the contract of February 2, 1934, was void by operation of law and should be set aside (Appendix 4 a and 8 a). In the Interpleader

action, petitioner did not disaffirm the contract of February 2, 1934. On the contrary, petitioner alleged that the policies had been assigned to Mathews as collateral security under a pledge agreement to secure a loan; that the loan had been repaid, and that petitioner should be awarded the cash surrender value thereof (Appendix 16 a to 20 a). (Argument of counsel, appendix 427 a to 433 a).

D. Valid Contract of Sale.

The District Judge concluded that "The contract of February 2, 1934, was a valid contract of sale entered into for a present consideration; *i. e.*, the cancellation of Lum's debt to Mathews and the payment of debts owed by Lum at that time except a few debts that were otherwise secured" (Appendix 546 a); that it was not a general assignment for the benefit of creditors (547 a); that it was not a conveyance in defraud of creditors; that there was no evidence of actual fraud and none of statutory fraud, because the $109,765.83 which Mathews had paid to Lum was a fair consideration for the transfer of Lum's assets.

Therefore, the petitioner could not disaffirm the contract in Action No. 1769 in order to recover the shares of stock. Because it was a "valid contract of sale" the plaintiff could repurchase the assets including the insurance policies only by adhering to the terms of the contract.

E. Plaintiff's Contract Obligations Unperformed.

Lum contracted to assign three policies having a combined face value of $42,500.00 and on which $7,392.36 had already been borrowed, to Mathews and agreed to pay the future premiums thereon (Appendix 10 a). Actually, as reflected in the opinion of the District Judge, Lum did not

pay the premiums as agreed. On the contrary he obtained additional loans on the policies, thereby reducing the security, used these loans to pay premiums and made the assignments to Mathews "as collateral" instead of outright. In addition Mathews paid out $15,957.84 in premiums and to repay policy loans prior to Lum's bankruptcy in 1940 when the cash surrender value amounted to $15,-071.70, and at least $6,790.42 since that date (Appendix 545 a).

The other terms of the contract to be fulfilled by Lum to repurchase the assets thus transferred included the obligation to keep the option to repurchase alive by certain annual payments and to "repurchase any or all of the foregoing property at a price and on terms to be agreed upon at the time of repurchase by the parties thereto or their heirs, executors, or administrators" (Appendix 11 a).

There is nothing in the pleadings nor in any communications or conferences between the parties to indicate any willingness, intention or ability on the part of Lum or the petitioner to exercise the option to repurchase the property on these terms.

F. Sproul's Testimony Incompetent and Misleading.

Petitioner contends that Lum's option account was actually overpaid at the time a default was declared. Sole reliance for this claim is placed on the testimony of one Charles Sproul, an accountant retained by the petitioner. (Petitioner for writ, p. 6). Sproul made certain calculations from entries in an "Income Account" maintained by attorneys for the respondent to reflect the current status of the investment Mathews had made in Lum's assets.

From a total of all the entries for each year Sproul concluded that Lum had total credits toward his option payments of $17,245.92 when default was declared, whereas the amount required to keep the option alive, according to his figures, was $15,026.45 (Appendix 502 a).

Sproul was also requested by counsel to calculate the value of Lum's assets as of February 2, 1934, and he quoted this figure as $165,067.99, readily admitting that in making his calculation he had added together the highest possible figures that he could find in the testimony (Appendix 531 a).

The competency of this testimony was made the subject of an objection:

> "Mr. Mills: If the Court please, I object to any speculation on the part of any accountant as to values in this case. He is only encumbering the record and it is not material, and he is not competent to make any such guess calculation.
>
> Mr. Kountz: If your Honor please, all I am asking him to do is add up the figures and opinions already put in the record by other people. It is just a calculation for the assistance of the Court.
>
> Mr. Mills: You can add it up yourself. I don't think we should waste time having a witness put it in the record where it may cost money to get it out." (Appendix 503 a.)
>
> * * * * *
>
> "Mr. Mills: Is that just for your Honor's information? It isn't evidence, of course.
>
> The Court: It is just a calculation, I assume.
>
> Mr. Kountz: I will stipulate on the record here that the testimony of this witness is offered only for the assistance of the Court as a mathematical calculation. The man is not testifying as an expert except as an expert accountant." (Appendix 532 a.)

G. Accounts Used by Sproul Actually Show Deficit of $1721.66.

Relying upon the obvious incompetency of the testimony and counsel's stipulation, the respondent saw no occasion nor necessity to produce the bookkeeper and additional witnesses to adduce the actual facts.

It still appears sufficient to direct the court's attention to Plaintiff's Exhibit One entitled "Statement of Accounts of George B. Mathews against George H. Lum to January 1, 1939" (Appendix 41 a), which was completely ignored by the witness. This statement reflects that the total credits toward the option account were $13,334.98, or $1,691.43 less than the amount the witness estimated was necessary to keep the option alive.

In fact, the figures from which the witness Sproul obtained his totals include numerous items which cannot be considered in the option account, the most obvious of which is the entry dated June 1, 1937 in the sum of $2,529.71 (Appendix 109 a).

It should have been obvious to the witness that this was not a cash entry because it is prefaced by the letter "J", indicating, according to accepted accounting practice, a journal entry as distinguished from a cash receipt (R) or a cash disbursement (D).

It is not even necessary to refer to the journals for an explanation because these entries are explained in the exhibits already in evidence. On Plaintiff's Exhibit 8 (Appendix 107 a) in the asset account, appear the figures

7/5/38	(Old note cancelled)	$13,070.17
"	(New Note)	10,540.46
		$ 2,529.71

7/5/38	(Old note cancelled)	$11,805.32
	(New Note)	10,540.46
		$ 1,264.86

It is accepted practice in accounting on an accrual basis to enter these items, $2,529.71 and $1,264.86, in the income account merely as a recognition of a debt.

A further explanation of the bookkeeping practice involved appears in the direct examination of Joseph A. Albrecht by counsel for the petitioner (Appendix 67 a). This was not an account between Lum and Mathews (Appendix 76 a) and this procedure was used merely to assist in computing the 4% interest which was to attach to the repurchase price if and when Lum exercised his option to repurchase the assets in accordance with Article VII of the contract (Appendix 12 a).

The same is true of an entry on June 1, 1934 in Plaintiff's Exhibit 8-B in the sum of $1,264.86 prefaced by the explanation "J 272" (Appendix 111 a).

No such sums were received from Lum, either in cash or on his behalf from the investment.

These are not the only items erroneously included in the totals in Sproul's testimony. The income account reflects cash receipts amounting to $146.56, representing interest on a note executed by Lum on July 20, 1934, subsequent to the contract of sale and independent of that transaction.

Therefore without further inquiry it is apparent that the total of $17,245.92 computed by witness Sproul must

be reduced by $3,941.13. The $2,219.47 overpayment "calculated" by Sproul has been replaced with a deficit of at least $1,721.66.

Since the true facts are apparent from the exhibits themselves it is difficult to understand how a qualified accountant could pretend otherwise. Furthermore, petitioner's repeated references to the "uncontradicted evidence" with reference to Sproul's testimony is somewhat inconsistent with Counsel's stipulation that his testimony was incompetent, the deficiency in option payments shown in Plaintiff's Exhibit # 1 and the witnesses admitted use of the "highest possible" figures in the evidence in making calculations.

H. Decision of District Court Upheld Three Times by Circuit Court.

Petitioner appealed to the Circuit Court of Appeals for the Third Circuit and the judgment was affirmed on October 16, 1945 (Appendix 585 a).

A petition for a rehearing reciting, among other things, the allegation that Lum was not in default on his option payments, was denied on December 13, 1945 (Appendix 589 a).

On March 4, 1946 the Circuit Court again reviewed this specific question on motion of the petitioner for a recall of mandate and an extention of time in which to file a petition for rehearing (Appendix 592 a). This motion was also denied.

ARGUMENT.

POINT I.

Petition does not recite proper or sufficient grounds for invoking the jurisdiction of this Court under its Rule 38, Subdivision 5 (b).

This court has repeatedly held that a writ of certiorari will not issue "merely to review the evidence or the inferences drawn from it."

General Talking Pictures Corporation v. Western Electric Company, 304 U. S. 175, rehearing denied 305 U. S. 675.

And where "these findings were made, after hearing, by the District Judge, upon undisputed or conflicting evidence," and "were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable."

Alabama Power Company v. Harold L. Ickes, 302 U. S. 464.

Particularly is this true where both the District and Circuit Courts have concurred in findings of fact which are not shown to be plainly erroneous or unsupported by the evidence.

Virginia Street Railway Co. vs. System Federation No. 40, 300 U. S. 515.

A. M. Anderson vs. Katherine Kilpatrick Abbott, 321 U. S. 349, rehearing denied 321 U. S. 804.

Goodyear Tire and Rubber Company, Inc. v. Ray-O-Vac Company, 321 U. S. 275.

These citations are certainly applicable to this petition. The question as to whether or not the option payments were made in accordance with the terms of the contract is a question of fact, necessitating a review of the testimony and exhibits, including an appraisal of the credibility of witnesses, the sufficiency of proof and similar questions.

The construction of the contract presents a question of law insofar as the rights of the parties are to be determined in accordance with the law of the State of New York where the agreement was executed. Otherwise it is primarily a question of fact involving its self-sufficiency, the nature of the terms thereof and the definitive rights and obligations of the parties thereto.

No conflict on the law is alleged and the findings of fact and the Court's conclusion of law that it was a valid contract of sale were affirmed by the Circuit Court of Appeals for the Third Circuit and reaffirmed on two subsequent petitions for a rehearing.

POINT II.

Petitioner's request for an accounting transcend the jurisdiction of the District Court arising out of Section 118 or interpleader action.

This litigation originated in Action No. 1769 to determine title to certain shares of stock in a Pennsylvania Corporation under Section 118, Title 28, U. S. C. A. This action was predicated on the theory that the transfer was void because in fraud of creditors. When the contract was upheld as a valid contract of sale for a fair and present consideration of $109,765.83, petitioner abandoned this

theory and now affirms the contract, contending that it constituted a mere pledge.

Since the petitioner now affirms the contract, the title to the shares is no longer in question and the jurisdiction over the respondent with respect to that action has ceased.

The District Court also acquired jurisdiction of the respondent, a non-resident, for the limited purpose described in Section 41 (26) of Title 28, U. S. C. A. This was an interpleader Action, No. 2200, limited to a determination of the rights of the parties to certain insurance policies.

By amendment to the *ad damnum* clause in the interpleader action, the petitioner endeavored to enlarge the issues beyond the scope of the statute cited, by requesting the court to adjudicate all matters between parties arising out of the contract of February 2, 1934 (Appendix 433 a).

It is true that respondent might have withdrawn his appearance when, by the amendment, the petitioner was allowed to present an entirely new or radically different cause of action, on the grounds that enforced appearance for one purpose should not be used for a broader or different purpose.

Maya Corporation v. Smith, 32 Fed. (2nd) 350.

However, such a withdrawal would have jeopardized the respondent's rights to the insurance policies, the court having jurisdiction to make a judgment in *rem*.

Therefore respondent continued to appear in the interpleader action under protest to the added cause of action for an accounting and still maintains that the relief demanded by the petitioner transcends and is completely outside the jurisdiction of the District Court.

POINT III.

Question of payment or non payment of option installments immaterial to decisions in Actions No. 1769 and No. 2200.

In view of the foregoing analysis of the jurisdiction which the District Court acquired over the respondent in the two actions initiated by the petitioner, it is apparent that the question of whether or not Lum kept his option alive is immaterial.

It is submitted that the petitioner's rights to the policies were determined by the contract of February 2, 1934 and not by his payment or non-payment of the option installments.

His remedy, even if compliance could be established, would lie in an action for damages on the contract or for an accounting. Such actions would have to be brought in the District Court for the Western District of New York where respondent resides.

Petitioner, in effect, affirms the contract which transferred title to the policies and demands an accounting to determine whether or not Matthews has realized more on the transferred assets than $109,765.83 plus interest at 4%. Presumably the petitioner is demanding that, if any excess be found, such excess should be paid over to him. He would like to have the insurance policies considered part of the excess.

On the other hand, petitioner might be seeking damages for an alleged breach of the contract giving Lum an option to repurchase the transferred assets. Presumably

some method would have to be devised to determine the amount of damages and Petitioner evidently would like to have the insurance policies included in the measure of damages.

It is difficult to see how the District Court for the Western District of Pennsylvania could make any such award when its jurisdiction is founded solely on actions of a limited character.

Moreover, even if the option were considered still alive it would be incumbent upon petitioner to tender the purchase price as a prerequisite to compelling performance.

In the case of the insurance policies the respondent has already made payments for premiums and to discharge Lum's policy loans in an amount several thousands of dollars in excess of the cash surrender values. So there could be no equity in favor of the petitioner even if he succeeded in this action.

POINT IV.

Petitioner, if aggrieved by the 12th Finding of Fact, had adequate remedy to correct it by motion to District Court.

If, as contended by the petitioner, the 12th finding is in need of clarification, he had an adequate and immediate remedy too for that purpose in a motion to the District Court under Rule 52 (b) of the Rules of Civil Procedure:

> "(b) Amendment. Upon motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly * * *."

No such motion was made by the petitioner.

The question was later raised by appeal to the Circuit Court of Appeals. The judgment in favor of the respondent was affirmed. The petitioner then filed a petition for a rehearing specifying the 12th finding as error. This was denied. A further motion was made to recall the mandate, referring in even greater detail to the 12th finding.

The Circuit Court of Appeals, in its opinion, said: "We quite realize that the questions are arguable".

Nevertheless, the Court continued "The District Judge, having all the testimony before him, resolved it in well defined conclusions. We think that all his conclusions are supported by such evidence and we could not say, if we would, that they are clearly erroneous".

POINT V.

The construction of the contract of February 2, 1934, approved on three separate occasions by the Circuit Court of Appeals.

Petitioner has apparently abandoned his original theory that the contract of February 2, 1934 was void because a conveyance in fraud of creditors and now affirms the contract and contends that it constituted a pledge.

In making this assertion, petitioner refers to those provisions in the contract which were intended to enable Lum to repurchase any or all of his assets.

This was strictly a business transaction to extricate Lum from serious financial difficulties. Nevertheless, Mr. Mat-

hews agreed to tie up $109,765.83 of his money for a period up to 15 years with the possibility of realizing only 4% on his investment so that his friend might be able to repurchase his assets. This was not a loan. Lum had already borrowed to the extent of his worldly goods and the only alternatives were the threat of future bankruptcy or a sale of his assets for enough money to insure his solvency.

The contract is explicit that it was a sale and with the exception of the collateral assignment of the insurance policies made by Lum himself in violation of his contract, all the evidence shows that all the incidents of ownership were vested in Mathews.

It is universally held that when the intent of the parties is expressed in clear and unambiguous language, the courts will enforce the contract according to its terms. No ambiguity or lack of clarity is alleged. No attempt was made by the petitioner to fully explore the intent of the parties. In fact the only witnesses interrogated on the subject were Edward N. Mills and Joseph A. Albrecht, both of whom were called by the petitioner and whose testimony is binding upon him.

> "Question: Mr. Albrecht, could you explain this: Is it your theory that this contract, or is it your position that this contract of February 2, 1934, whereby the assets were transferred from Lum to Matthews was an arrangement of pledge, or was it an outright conveyance?
>
> Answer: Outright conveyance." (Appendix 56 a.)
>
> * * * * *
>
> "Question: Mr. Mills, is it your position that this transaction represented by this contract of February 2, 1934 between these parties, was an outright transfer by Lum, or a pledge?
>
> Answer: Well, the contract speaks for itself; but my interpretation is that it was an outright sale of all his right, title and interest.

Question: Was there any intention of the parties, so far as developed by you in your conferences and intercourse with the parties in and about the time that the contract was made, that the parties actually intended the pledge?

Answer: No, nothing whatever.'' (Appendix 38 a.)

It is true that the construction of contracts ordinarily presents mixed questions of fact and law. Nevertheless, the District Judge made at least seven separate findings with reference to the contract and his opinion cites the applicable case and statutory law of the State of New York in support of his conclusion of law that the contract "was a valid contract of sale".

There is no conflict to be resolved by the Supreme Court. The conclusion of the District Judge is consistent with the judicial decisions in similar cases in the State of New York.

Tompkins vs. Hunter, 149 N. Y. 117.
Kelly vs. Babcock, 49 N. Y. 318.
Hine vs. Bowe, 114 N. Y. 350.
Dodge vs. McKechnie, 156 N. Y. 514.
Cook vs. Berrott, 21 N. Y. Supp. 358.

The conclusion of the District Judge with reference to the contract was affirmed by the Circuit Court of Appeals, and no conflict is alleged with a similar decision in any other circuit.

The case of Home Bond Company vs. McChesney, 239 U. S. 568, is not comparable. That case involved an alleged purchase of accounts receivable at certain discounts. The debtor remained the ostensible owner of the accounts receivable, made the collections at his own expense, assumed the risk of any uncollectable accounts, and remitted the

amounts collected to the so-called purchaser to repay the amounts of so-called "purchase price" advanced. It was held that the transaction was a transfer of the accounts receivable merely as collateral security for loans at usurious rates of interest and that the words of purchase were sham and devices to conceal this purpose.

Obviously this decision has no application to a situation where all the incidents of ownership were transferred for a fair and present consideration.

In General Motors Acceptance Corporation vs. Mid-West Chevrolet Co., 66 Fed. (2nd) 1, an automobile dealer who had been transferring conditional sales contracts to GMAC brought an action to recover twice the interest paid on a series of allegedly usurious loans. The evidence of the nature of agreement rested in oral conversations, correspondence and certain printed forms known as the GMAC Plan. The Circuit Court held that the evidence did not justify a conclusion that the transactions were loans at usurious rates of interest and reversed the verdict which had been awarded the dealer.

In Mount Tivy Winery Co. vs. Lewis, 134 Fed. (2nd) 120, the plaintiff winery was taxed on wine it had stored with the Fidelity Warehouse Corporation. The winery contended that the tax should be paid by the bank because the bank held negotiable warehouse receipts under an agreement transferring these and similar documents to the bank as "collateral security" for the winery's indebtedness. The winery was held liable for the floor stock tax.

None of these cases bear on the issues or contain a comparable set of facts.

Conclusion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

EDWARD N. MILLS,
ALBRECHT, MAGUIRE & MILLS,
1300 Genesee Building,
Buffalo, New York.

P. K. MOTHERAL,
REED, SMITH, SHAW & MCCLAY,
747 Union Trust Building,
Pittsburgh 19, Pennsylvania.

Attorneys for Jenny R. Mathews, Executrix, Defendant-Respondent.